No. 88-1434

In The

# Supreme Court of the United States

October Term, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
*Petitioners,*

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

June 29, 1989

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## QUESTION PRESENTED

Whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties?

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## BRIEF OF THE BUSINESS COUNCIL ON THE REDUCTION OF PAPERWORK AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Business Council on the Reduction of Paperwork ("BCORP") respectfully submits this brief as amicus curiae in support of the petitions for writ of certiorari filed by the petitioner, Elizabeth Dole, Secretary of Labor. Pursuant to Supreme Court Rule 36.2, the parties have consented to the filing of this brief. BCORP has filed their written consents with the Clerk.

## INTEREST OF THE AMICUS CURIAE

The Business Council on the Reduction of Paperwork ("BCORP") is a non-profit, non-partisan association whose basic purpose 's to assist the federal government, business entities and not-for-profit research institutions in maximizing the value and meaningfulness of federally generated data and records, while minimizing the burden of federally sponsored reporting and recordkeeping. BCORP's history dates to the 1942 enactment of the Federal Reports Act; it is the oldest organization devoted to this purpose.[1] BCORP's membership consists of twenty-eight national and regional trade associations and sixty individual business and educational organizations. Through its trade association members BCORP reaches out to thousands of other small and large enterprises to inform and involve them on issues addressing the burden and practical consequences of regulatory reporting and recordkeeping requirements. Many BCORP members are adversely affected by the Third Circuit's ruling in this case.

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[1] BCORP is the successor to the Advisory Committee on Government Questionnaires which was originally organized in 1942 at the request of the Director of the Bureau of the Budget in response to the enactment of the Federal Reports Act, ch. 811, 56 Stat. 1078 (1942). The Advisory Committee was later renamed the Advisory Council on Federal Reports ("ACFR"), and following the enactment of the Federal Advisory Committee Act in 1972 (86 Stat. 770), 5 U.S.C.A., Appendix 2 § 1 *et seq.* (1967), which terminated the existence of numerous federal advisory committees (such as ACFR) whose charters were not expressly renewed, ACFR reorganized as the Business Advisory Council on Federal Reports ("BACFR"). BACFR's stated

(Continued on following page)



BCORP's interest in the present dispute is more than academic. This is a case of enormous economic significance, not only to BCORP's membership, but to the commercial and research sectors of our economy and the public generally. The rule of law established by this case threatens to exempt from OMB review under the Paperwork Reduction Act of 1980 ("PRA") many unnecessary, federally mandated recordkeeping requirements with the effect of disrupting the Congressional goal of reducing paperwork burden. The court of appeals ruling lays open to challenge all OMB decisions under the PRA when those OMB decisions are based and articulated solely in terms of reducing paperwork burden. The ruling in this case will curtail, by judicial fiat, the congressional objective of reducing the burden of federally mandated recordkeeping and reporting by eliminating OMB clearance of agency rules and thus imposing costs on BCORP's members and the nation's businesses that might have been avoided as Congress intended.

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purpose was to advise the Director of the Office of Management & Budget ("OMB") and the Comptroller General of the United States, consistent with their respective statutory responsibilities under the Federal Reports Act, in coordinating the information – collecting services of the federal agencies with a view to minimizing the burden upon business enterprises, reducing the cost of government, and improving the quality of federally sponsored data collection and recordkeeping programs. In 1986, the association's name was changed to BCORP to reflect the national mandate established by Congress to bring about the *reduction* of unnecessary paperwork. BCORP is now the single private organization devoted exclusively to this purpose.

In enacting the Federal Reports Act and the PRA, Congress recognized that the federal government should, as a national objective, require efficiency in the collection, maintenance, and dissemination of information when it was required by the federal government. 44 U.S.C. § 3501. The PRA itself set an immediate objective of *reducing* the existing burden of Federal collection of information by twenty-five percent within three years. 44 U.S.C. § 3505(1). The need for this legislation was a response to the finding of the Federal Paperwork Commission which estimated in 1977 that the cost of Federal Paperwork requirements then amounted to $100 billion a year, about $500.00 for every man, woman and child. S. Rep. 930, 96th Cong., 2d Sess. 3 (1980). The Paperwork Reduction Reauthorization Act of 1986 set a further goal of reducing the burden of Federal collections of information by at least 5 percent in each of fiscal years 1987, 1988 and 1989. 44 U.S.C. § 3505(4).

In its most recent report to the President, OMB estimated that the public will spend over 1.7 billion hours in fiscal year 1989 complying with federal information collection requests.[2] Sixty-three percent of the burden falls

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[2] Office of Management and Budget, *INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT* 1 (April 14, 1989) (hereinafter "1989 Information Collection Budget"). The figure may actually be much higher. The I.R.S. recently released a report stating that the taxpayer paperwork burden alone was 5.3 billion hours. A.D. LITTLE & CO., STUDY FOR THE INTERNAL REVENUE SERVICE ON TAXPAYER PAPERWORK BURDEN (August 31, 1988).



on business and other institutions.[3] In the same report, OMB reported that in every year but fiscal year 1987 OMB has actually been able to reduce paperwork burden: from 1981-1988 OMB was able to reduce that burden by over 500 million hours pursuant to its authority under the PRA.[4]

BCORP has another interest in this suit. One of the fundamental improvements which the PRA, 44 U.S.C. § 3501 *et seq.*, made to the old Federal Reports Act was the public participation provisions now codified in §§ 3507(a), 3508 and 3517 of Title 44 of the U.S. Code whereby the Director of the OMB must give interested agencies and persons a "meaningful opportunity to comment" before determining whether the "collection of information" by an agency is "necessary for the proper performance of the functions of the agency." As noted by the Senate Governmental Affairs Committee in the Senate Report accompanying S. 1411, which became the PRA, BCORP's predecessor-in-name:

> The Business Advisory Council on Federal Reports (BACFR) has monitored the operations of the Federal Reports Act throughout the Act's history. The Council stressed to the Committee the value of increased public awareness and participation. As a result of their comments on S. 1411, the Committee has taken additional steps to provide a meaningful opportunity for public involvement.

S. Rep. No. 930, 96th Cong., 2d Sess. 16 (1980). In this case, BCORP petitioned OMB to hold hearings on OSHA's Hazard Communication Standard ("HCS") to hear the

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[3] 1989 Information Collection Budget, *id.* at 20.

[4] *Id.* at 4.

views of the public on this significant new federal recordkeeping requirement, and OMB held hearings. BCORP, some of its members, OSHA, and other interested parties participated in those hearings and shared their views on the paperwork burden issue posed by the HCS as well as the Revised HCS when it was extended to the non-manufacturing sector. In granting the motion of the United Steelworkers of America and Public Citizen, Inc. from which the present dispute arises, the Third Circuit effectively ruled that public hearings on the paperwork burden posed by the recordkeeping requirements of the Revised HCS should never have been held at all. This result undermines the nation's effort to involve both the public and the agencies in the paperwork reduction process so that all interested parties can evaluate the need for information and the cost attributable to collecting, maintaining and disseminating it. OSHA's Revised HCS is the fourth most burdensome information collection requirement imposed by the federal government; it is exceeded only by the individual income tax return and Department of Defense procurement requirements. The Revised HCS alone is responsible for 3.1% of the total federal paperwork burden.[5]

BCORP submits this brief on behalf of all of its members as *amicus curiae* in support of the Petitioner.

## SUMMARY

This case involves disclosure-oriented recordkeeping requirements imposed by OSHA's Revised Hazard Communication Standard, 29 C.F.R. § 1910.1200 (1989). They are "disclosure-oriented" because the regulation requires that the records (in this case health and safety data on hazardous chemicals in the workplace) be maintained primarily for the benefit of a segment of the public (employees) to whom the data is disclosed by or made available by employers. The records also have to be maintained for OSHA as well, 29 U.S.C. § 657(c)(1), but they do not necessarily have to be sent to or provided to OSHA or any other federal agency.

[5] *Id.* at 23.



The Question Presented for review is a question that was asked and answered affirmatively by the Congress in enacting The Paperwork Reduction Act of 1980, and subsequently by OMB in promulgating rules thereunder. The issue of whether the Paperwork Reduction Act's review process extends to agency regulations that require regulated entities to collect information for disclosure to third parties was debated in the hearings leading to the enactment of the PRA. The legislative decision to extend the PRA review process to such disclosure-oriented regulations is reflected in the broad definition of "information collection request," 44 U.S.C. § 3502(11) which includes "reporting or recordkeeping requirements," and it is further reflected in the statutory pattern as a whole. The OMB, pursuant to a legislative delegation of authority under 44 U.S.C. § 3516, has promulgated rules necessary to exercise its authority provided by the PRA which are entirely consistent with the legislative design to include disclosure-oriented regulations within the PRA review process. 5 C.F.R. § 1320, *et seq.*

This case is to be decided by statutory construction. Your *amicus curiae* starts from the proposition that:

> In ascertaining the plain meaning of a statute, the court must look to *the particular statutory language* at issue, *as well as the language and design of the statute as a whole.* [citations omitted] If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the agency regulation is a permissible construction of the statute. [citations omitted] If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute.

*K mart Corp. v. Cartier, Inc.*, ___ U.S. ___, 108 S.Ct. 1811, 1817 (1988) (emphasis supplied). The Third Circuit's construction of the PRA and its holding in this case cannot be sustained under this analysis, and therefore the decision of the court of appeals below must be reversed.

## ARGUMENT

### I. In Enacting The Paperwork Reduction Act Of 1980, Congress Intended To Bring Disclosure-Oriented Recordkeeping Requirements Within the Scope Of The Act's Review Process

The enactment of the PRA arose out of a conviction that the old Federal Reports Act, ch. 811, 56 Stat. 1078 (1942), needed to be "strengthened." A six year congressional inquiry led to this conviction. In 1974, Congress established the Commission on Federal Paperwork. See Act of December 27, 1974, Pub. L. No. 93-556, 88 Stat. 1789 (1974). In part, the Commission was established



because of congressional concern that a portion of the federal paperwork burden imposed by federal reporting requirements was "not covered by the [Federal Reports] Act." S. Rep. No. 1323, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 6661, 6664. In one of its reports to Congress the Commission noted:

> "The Act is not clear on its coverage of a major portion of the paperwork burden – recordkeeping requirements – although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines . . . Not all agencies covered by the Federal Reports Act comply fully with its requirements.
>
> * * *
>
> For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws. There were negotiations and discussions from time to time between the OMB and the agencies concerned, not always with clear-cut resolution. Generally, the OMB was not inclined to make a head-on confrontation, nor did it have any specified statutory means to enforce compliance.

Commission on Federal Paperwork, The Reports Clearance Process 1 and 43 (Sept. 9, 1977).

During hearings before the Senate Government Affairs Committee in 1979, the Comptroller General

pressed his views that these disclosure-oriented recordkeeping requirements should be subject to the federal reports clearance process. See *Paperwork and Redtape Reduction Act of 1979, Hearing before the Subcommittee on Federal Spending Practices and Open Government, Senate Committee on Governmental Affairs*, 96th Cong., 1st Sess. 123-124 (1979) (Letter of Elmer B. Staats to Abraham Ribicoff dated Oct. 31, 1979). In response to this view, the term "recordkeeping" was proposed to be included in the definition of the term "collection of information" in S. 1411 introduced by Senator Lawton Chiles in 1979. *Id.* at 94-95. "Recordkeeping" was not specifically included in the Federal Reports Act definition of this term. SEC Commissioner Evans urged the Senate Subcommittee to resist including disclosure-oriented recordkeeping requirements within the definition of "collection of information," and recommended that the term be limited to "collection for statistical purposes." *Id.* at 66-67 (Testimony of Commissioner John R. Evans). The Senate Bill did not accommodate Commissioner Evans' view.

In the following session of Congress, a House companion bill to S. 1411 was introduced, H.R. 6410, which contained the same proposed definition, and specifically defined the phrase "recordkeeping requirement" to include a requirement "to maintain specified records." *Paperwork Reduction Act of 1980, Hearings Before a Subcommittee of the House Committee on Government Operations*, 96th Cong., 2nd Sess. 6 (1980). Testifying before the House Subcommittee, the Comptroller General noted that the House bill embraced the recommendations to resolve the problems which he and the Paperwork Commission



had previously identified with the reports clearance process:

> Section 101 of the bill replaces the Federal Reports Act, incorporating five needed changes. First, recordkeeping requirements are specifically included in the reports clearance process . . .
>
> The Federal Reports Act is presently unclear on whether recordkeeping requirements are subject to clearance. In practice, both GAO and OMB have required that they be cleared. Some agencies, however, have resisted compliance with these efforts.
>
> Second, the act's definition of "information" is clarified to eliminate the ambiguity. For example, the Securities and Exchange Commission has interpreted the act to apply only to situations where the answers provided by respondents are to be used for statistical compilations of general public interest. This interpretation severely limits the coverage of the act and the controls over Federal information collection efforts.

*Id.* at 39-40 (Testimony of Elmer B. Staats).

When the hearings were completed and the bills were presented for passage, one "feature of the [PRA] which strenghten[ed]" and "clarified" the Federal Reports Act was specifically to include "recordkeeping requirements" in the definition of "collection of information." S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). Specifically, the Senate Report stated:

> *Information is also collected to form the basis for disclosure to the public.* For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by

persons making investment and other financial decisions. In this connection, Federally-mandated *disclosures to the public* by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, information either to carry out its regulatory or other functions *or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.*

The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. *The definition includes information maintained by persons which may be but is not necessarily provided to a Federal agency.*

*Id.* at 39-40.

The House Report accompanying H.R. 6410 contained a similar discussion:

> . . . the definition of "collection of information" clarifies an ambiguity as to the types of information collection covered by the Act. The Comptroller General testified that certain interpretations, such as that by the Securities and Exchange Commission, severely limit the scope of the act and the controls over Federal information collection efforts.
>
> • • •
>
> The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements. The Committee fully expects SEC to comply with the "more extensive" definition of collection of information contained in H.R. 6410.

H. Rep. No. 835, 96th Cong., 2d Sess. 19 and 23 (1980).



These views were reiterated by Senator Chiles, the PRA's principal sponsor, when Congress considered amendments to the PRA in 1984. He explained:

> [t]he notion that the law was dedicated primarily to forms, questionnaires and surveys 'and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally sponsored collections of information' is a fundamental misreading of what the law states [and] what Congress in 1980 intended. . . .

S. Rep. No. 576, 98th Cong., 2d Sess. at 43 (1984).

In 1986, Congress enacted amendments to the PRA supplementing and clarifying the Act. Paperwork Reduction Reauthorization Act of 1986, Pub. L. 99-591, 100 Stat. 3341-335 (1986). Consistent with all of the foregoing, 44 U.S.C. § 3501(5) was amended in part to read (amendment italicized):

> § 3501. Purpose
>
> The purpose of this chapter is –
>
> (5) to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and for persons who provide information to *and for* the Federal Government; and
>
> • • •

While this subsection is not directly at issue here, this amendment underscores the spirit of the PRA that its scope extends to federally-sponsored information requests, including requests that require private persons

to disclose information *"for"* the federal government to the public.

### II. OMB's Regulations Are A Permissible Construction Of Its Authority Under The PRA To Review Disclosure-Oriented Recordkeeping Requirements Developed As Part Of An Agency's Function And Mission

OMB, through its Office of Information and Regulatory Affairs (OIRA), is charged with the responsibility of administering the PRA. 44 U.S.C. § 3503. Additionally, each federal agency is responsible for "complying with the information policies, principles, standards, and guidelines prescribed by the Director" of OIRA. 44 U.S.C. § 3506(a). The Director of OMB is granted express authority to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. § 3516.

An "information collection request" is defined broadly to include not only report forms and questionnaires but a "collection of information requirement or similar method calling for the collection of information." 44 U.S.C. § 3502(11). The "collection of information" is likewise defined broadly to include "the obtaining or soliciting of facts * * * through the use of * * * identical recordkeeping requirements imposed on ten or more persons * * *" 44 U.S.C. § 3502(4). A "recordkeeping requirement" is a "requirement imposed by an agency on persons to *maintain* specified records." 44 U.S.C. § 3502(17).

OMB's own regulations implementing the PRA, 5 C.F.R. § 1320, are consistent with the clear reading of the



PRA and with the legislative history. As the Senate Report commented, "Information *maintained*, as opposed to directly provided by Federal agencies, is therefore subject to the clearance requirements for collections of information set forth in Section 3507." S. Rep. No. 930, 96th Cong., 2d Sess. 38 (1980). Furthermore, both the Senate Report and the House Report confirm that "information is also collected to form the basis for *disclosure to the public*." Thus OMB relies on sound legislative authority when it explains that the "obtaining or soliciting of information" by an agency "includes any requirement or request for persons to *obtain, maintain, retain*, report or *publicly disclose information*." 5 C.F.R. § 1320.7(c) (emphasis supplied). "Requirements by an agency for a person to obtain for the purpose of disclosure to members of the public through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency." 5 C.F.R. § 1320.7(c)(2). This rule is entirely consistent with the purpose of the PRA "to minimize the cost to the Federal Government of collecting, maintaining, using and disseminating information," 44 U.S.C. § 3501(2), insofar as OMB has determined that the collection, maintenance, and dissemination of information is more efficiently handled by private persons instead of the Government itself.

## III. The Decision Of The Third Circuit Improperly Imposes Its Own Construction On The PRA

This case came before the Third Circuit in an unusual posture. Previously, the Third Circuit had ordered OSHA to revise its Hazard Communications Standard ("HCS") so that it extended to the non-manufacturing sectors of the economy. *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3rd Cir. 1987) ("USWA II"). On August 24, 1987, OSHA published its Revised HCS, not only extending the rule to the non-manufacturing sectors, but also including three new provisions not contained in the original HCS. 52 Fed. Reg. 31852 (Aug. 24, 1987) In compliance with its duty under 44 U.S.C. 3507(a)(3) that "an agency shall not conduct or sponsor the collection of information unless, in advance of the adoption *or revision* of the request . . . , the Director has approved the proposed information collection request . . . ," OSHA submitted the Revised HCS to OMB on September 10, 1987. 52 Fed. Reg. 36652 (Sept. 10, 1987). OMB disapproved of the three new provisions of the Revised HCS on grounds of burden and duplication, and suggested less burdensome alternatives to OSHA.

On April 6, 1988, the Respondents moved the court of appeals to hold the Secretary of Labor in contempt of the Third Circuit's prior order in *USWA II* for submitting the Revised HCS to OMB, and for further relief pursuant to the All Writs Act. 28 U.S.C. § 1651(a). The Third Circuit expressly avoided the contempt issue, *USWA III*, 855 F.2d at 114, and held that "the instant dispute arose as the result of another federal agency's attempt to exceed its statutory authority." *Id.* The Secretary of Labor was not held in contempt. This case therefore squarely addresses the authority of OMB to review a revised disclosure-oriented recordkeeping requirement under the PRA.



The court of appeals held:

> Thus any rulemaking activity by any other federal agency falls outside the authority of OMB under the Paperwork Reduction Act of 1980 if it either: (1) does not require the "collection of information," or (2) embodies substantive policy decision making entrusted to the other agency. We hold that the three provisions in the hazard communication standard which OMB disapproved are insulated from OMB authority on both grounds.

*USWA III*, 855 F.2d at 112.

OMB disapproved of only three aspects of the Revised HCS. First OMB disapproved of the requirement that employers at multi-employer worksites maintain and exchange among themselves (or maintain at a central depository) the Material Safety Data Sheets (MSDS) on hazardous chemicals. The MSDS required by the HCS to be maintained by all employers is clearly the obtaining of facts through the use of a recordkeeping requirement to maintain specified records. As the underlying OSHA regulation requires:

> (8) The employer shall *maintain* copies of the required material safety data sheets for each hazardous chemical in the work place, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Emphasis supplied).

29 C.F.R. § 1910.1200(g)(8):[6] The Third Circuit concluded

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[6] The rule applicable to multi-employer worksites, 29 C.F.R. § 1910.1200(e)(2)(i) likewise contemplates that employers will maintain MSDS's at their own offices or at a central location in the workplace.

that the OSHA regulation at issue[7] did not require the employer to "compile" information but merely to transmit it or disclose it to employees. The PRA is not so narrow and it regulates agency rules which require persons to maintain information for disclosure to members of the public or the public-at-large. The Third Circuit not only ignored the legislative history of the PRA, but it totally ignored OMB's own PRA implementing regulation which states:

> Requirements by an agency for a person [employer] to obtain [an MSDS from a chemical manufacturer] for the purpose of disclosure to members of the public [employees] through posting, notification, labeling, or similar disclosure requirements constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency. 5 C.F.R. § 1320.7(c)(2)

Secondly, OMB effectively disapproved of the entire Revised HCS insofar as it failed to *expand* the exemptions for consumer products and FDA regulated drugs where there were pre-existing, duplicative disclosure requirements. The Third Circuit, overlooking the fact that it is the Revised HCS which calls for the "collection of information," mistakenly confused the issue and concluded that "exemptions from labelling requirements which would otherwise be duplicative" cannot be a "collection

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[7] Specifically, the requirement that employers at multi-employer workplaces maintain or provide to other employers at the workplace a MSDS for each hazardous chemical. 29 C.F.R. § 1910.1200(e)(2).



of information." *USWA III* at 112. This mistake in perception led the court of appeals to hold that these two OMB disapprovals were improper as well. Since it is the Revised HCS (not the exemption) that constitutes an information collection request, OMB's recommendation of an *expanded exemption* from the information collection requirements of the Revised HCS to avoid duplication in these two instances is properly a "disapproval."

The Revised HCS was an "information collection request" and OMB had authority by statute to review it.[8] 44 U.S.C. § 3507(a)(3).

The Third Circuit pinned its holding on a second theory too. The court of appeals accused OMB of "second-guessing" OSHA's policymaking, and held that OMB was without authority to do so, citing 44 U.S.C. §§ 3504(a) and 3518(e). Again, the court of appeals failed to look to the particular statutory language and the design of the statute as a whole. The Third Circuit's exclusive reference to these provisions of the PRA selectively misinforms the role intended for OMB by Congress.[9]

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[8] The Third Circuit's holding conflicts with the decision of the D.C. Circuit in *Action Alliance of Sr. Citizens of Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *cert. pending*, holding that a "collection of information" subject to OMB review need not be submitted to an agency.

[9] Sections 3504(a) and 3518(e) were two of three "safeguards" incorporated in the PRA to be sure there was no dilution in the independence of agencies. S. Rep. 930, 96th Cong., 2d Sess. 15 (1980). Section 3518(e) was simply a statement of belief that "the bill shall not affect in any way the

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Within the framework of the PRA, it is initially the responsibility of each federal agency to determine the agency's "need for the information" and estimate the burden that will result from the information collection request. 44 U.S.C. § 3507(a). OMB then fulfills its statutory mission to minimize the cost of collecting, maintaining and disseminating information, under the statutory grant of authority contained in 44 U.S.C. §§ 3504(a), 3504(c), 3507(a) and 3508 by reviewing an agency's "information collection requests"; in other words, reviewing whether an agency has met its statutory responsibilities under the PRA:

**§ 3504 Authority and functions of Director.**

(a) The Director shall develop and implement * * * and oversee the review and approval of information collection requests, * * * The authority of the Director under this section shall be exercised consistent with applicable law.

(c) The information collection request clearance and other paperwork control functions of the Director shall include –

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is *necessary for the proper performance of the functions of the agency*, including whether

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existing authority of *** OMB with respect to the substantive policies and programs of departments and agencies." *Id.* In the words of the statute, OMB's authority was neither increased nor decreased, but OMB was clearly charged under § 3508 with the authority to determine whether an information collection request was necessary.



the information will have practical utility for the agency. (Emphasis supplied).

**§ 3507. Public information collection activities-Submission to Director; approval and delegation**

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption *or revision* of the request for collection of such information –

* * *

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

**§ 3508. Determination of necessity for information; hearing**

Before approving a proposed collection request, the Director shall determine whether the collection of information by an agency *is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility*. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency *is unnecessary, for any reason, the agency may not engage in the collection of the information*. (Emphasis supplied).

The relationship between a federal agency and OMB under the PRA is also set out in 44 U.S.C. § 3518:

**§ 3518. Effect on existing laws and regulations**

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

* * *

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

Under this statutory framework, Congress has clearly "subjected" the federal agencies to the power vested in OMB and the Administrator of OIRA to determine whether a collection of information by an agency is "necessary for the proper performance of the functions of the agency." No other construction of Sections 3506(a), 3507(a), 3508 and 3518(a) is possible. The very language of § 3508 instructing OMB to "determine whether the collection of information is *necessary* for the *proper performance of the functions of the agency*" necessarily means that OMB will have to contemplate the agency's substantive role and functions in assessing whether the collection of information is "necessary." At a minimum, the very word "necessary" envisions that there will be some "second guessing" of an agency's action by OMB. Consequently, the mere fact that OSHA's policymaking in this case concerned the disclosure of information to workers does not remove a disclosure-oriented recordkeeping requirement from OMB's jurisdiction. Instead, it is merely one of the factors that OMB might consider in determining whether the collection of information is "necessary."[10]

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[10] The Director of OIRA clearly perceives such a balancing act for her role. "While the Act's underlying goal is to mini-

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The Senate Report confirms that it was ultimately the responsibility of the Director of OMB to determine an agency's need:

> *Necessity is thus the test under this section.* This determination is to include whether the collection of information: (1) has practical utility for the agency, (2) is not more than the minimum needed to meet the agency's objective, or (3) is not duplicative of similar information otherwise accessible. *If the Director determines that a collection is not necessary, he should not approve it.* The Director is authorized to give the agency and other interested persons an opportunity to be heard or to submit statements in writing before making a determination. *Unless the collection of information is specifically required by statutory law the Director's determination is final for agencies which are not independent regulatory agencies.*

S. Rep. No. 930, 96th Cong., 2d Sess. 49 (1980).

Congress knew that it had given significant authority to the Director of OMB under the PRA and it saw itself as the ultimate overseer of the Director's conduct in determining necessity.

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mize the Federal Paperwork burden on the public, the [PRA] also recognizes the need to weigh the burdens of the collection on the public against the needs of the agency." *Paperwork Act Oversight: Internal Revenue Service Forms W-4 and W-4A, Hearing Before the Subcommittee on Federal Spending, Budget and Accounting, Senate Committee on Governmental Affairs*, S. Hrg. 100-75, 100th Cong., 1st Sess. 30 (1987) (Statement of Wendy L. Gramm). Similarly, the most recent OMB Information Collection Budget states: "The ICB process requires a balance between the burden of the public of supplying this information and the practical utility in furthering the goals of the Federal government." *1989 Information Collection Budget, supra* at 2.

> The Congress itself has the responsibility and must ultimately ensure that the authority granted to the Director of OMB by this Act over both Executive branch and independent regulatory agencies and the override authority is not abused. As the history of the original Federal Reports Act demonstrates, the Congress always has the prerogative and capability to change those authorities.

*Id.* at 16.

At the time it enacted the PRA, Congress was aware that in some cases there would be a "close relationship between policy making and information management." H.R. Rep. No. 835, 96th Cong., 2d Sess. 23 (1980). However, the legislators felt that the agencies should be capable of justifying "their need for information used to establish policy or for other purposes." *Id.* As a practical matter, OMB demonstrated a certain solicitude for OSHA's needs in this case and suggested further rulemaking by OSHA on the HCS to justify its need for other portions of the HCS. This is hardly a case of "political interference" which concerned some members of Congress and prompted the enactment of the safeguards. It is a classic case of how the PRA was intended to work.

Succinctly, what the court of appeals did was to observe that one of OSHA's substantive functions included requiring employers to make disclosures to employees on health and safety issues. This fact alone, the court of appeals held, took OSHA's regulations enacted within the purview of this function outside of the PRA clearance process, leaving OMB without authority. This holding ignores "the particular statutory language at issue, as well as the language and design of the [PRA] as a whole." *K mart Corp. v. Cartier, Inc., supra.* Just as



Congress would not exempt the SEC from OMB's clearance process, this Court should not exempt OSHA.

It cannot be ignored that the PRA was enacted for the protection of the public, and in centralizing the clearance process in OMB Congress deliberately modified the practice under the Federal Reports Act where some agencies were accountable to no one and review was otherwise divided between OMB and the General Accounting Office. Congress deliberately chose to hold one agency accountable to it for achieving the objectives of the PRA. No section of the Act is more revealing of this purpose than Section 3512.[11] Although not directly implicated by the facts in this case, the spirit and intent of Section 3512 is clearly offended by the Third Circuit's ruling. Enacted for the protection of the public, Section 3512 requires that an OMB control number be assigned to each information collection request. That control number is a symbol to the American public "indicating that the Director of OMB is the accountable individual in government to be sure that the information is *needed*, is *not duplicative* of information already collected, and is collected *efficiently*." S. Rep. No. 930, 96th Cong., 2d Sess. 9 (1980) (emphasis supplied). It is a symbol that the information collection request has been "subjected to the clearance process described by

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[11] **§ 3512. Public protection**

**Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.**

Section 3507." *Id.* The Third Circuit's decision has deprived the public of the meaningfulness of the OMB control number (No. 1218-0072) assigned to the Revised HCS, because in this case the court of appeals has held that the clearance process should have never occurred.

The Third Circuit Court of Appeals improperly "impose[d] its own construction on the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

## CONCLUSION

For these reasons, the decision of the court of appeals below should be reversed.

Respectfully submitted,

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